

LEGISLATING MANDATORY REPORTING OF CHILD ABUSE IN INDIA AND CHINA: A DIVERGENCE OF LEGISLATIVE CHOICE¹

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Mandatory reporting is used as a tool for early identification of child abuse by countries around the world. However, there is variation in terms of the legislative models followed. The two models most commonly followed are universal mandatory reporting and stakeholder specific mandatory reporting. India and China joined the bandwagon and introduced legislation on mandatory reporting over a decade ago. While India has adopted the ambitious model of universal mandatory reporting, China has taken a more incremental and experimental approach with stakeholder-specific mandatory reporting. The paper aims to differentiate the legislative approaches taken by the two countries for introducing mandatory reporting for child abuse, by delving into the legislative history, legislative provisions, and implementation challenges for mandatory reporting in both jurisdictions. The paper does not comment on the sanctity of mandatory reporting, but is limited to a comparative analysis of the legislative strategies taken by India and China.

Keywords: *Mandatory Reporting, Child abuse, Legislative History, Divergence, China and India*

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I. INTRODUCTION

In 1962, Dr. C. Henry Kempe and his co-authors published an influential journal article titled ‘The Battered-Child Syndrome.’ They pointed out that “Battered-child syndrome, a clinical condition in young children who have received serious physical abuse, is a frequent cause of permanent injury or death,” and suggested that “physicians have a duty and responsibility to the child to require a full evaluation of the problem and to guarantee that no expected repetition of trauma will be permitted to occur.”² Inspired by medical research, U.S. states started passing laws on mandatory reporting of child abuse cases from 1963 onwards.³ This marked the beginning of legislative efforts for mandatory reporting.

Nowadays, legislation for mandatory reporting of child abuse⁴ is widespread across the world.⁵ Legislations related to mandatory reporting vary in their form and substance – while some cast a statutory reporting duty only on certain professionals, others place the same duty on all persons in the form of universal mandatory reporting (‘UMR’). The variation in legislative models depends on the legislative consideration of factors such as which instances to

² C Henry Kempe and others, ‘The Battered-Child Syndrome’ (1962) 181 JAMA 17.
³ Leonard G Brown III and Kevin Gallagher, ‘Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States’ Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania’ (2013) 59 Vill. L. Rev. Tolle Lege 37.
⁴ Child abuse here is a broad term, including physical, emotional or sexual hurt or risk toward a child.
⁵ Ben Mathews and Maureen C Kenny, ‘Mandatory Reporting Legislation in the United States, Canada, and Australia: A Cross-Jurisdictional Review of Key Features, Differences, and Issues’ (2008) 13 Child Maltreatment 50; Children’s Bureau, ‘Mandatory Reporters of Child Abuse and Neglect’, (*Child Welfare Information Gateway*, April 2019) <<https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda/>> accessed 24 January 2022, 2-6; Ali Mohammed Al Matrooshi, Syed Raza Shah Gilani, and Bahaudin G. Mujtaba, ‘Assessment of Mandatory Reporting Laws to Break the Silence of Child Sexual Abuse: a Case Study in the United Arab Emirates’ (2021) 1 SN Social Sciences 1.

report, who is mandated to report, whom should one report to, and the consequences of non-reporting and false reporting.

The enforcement of mandatory reporting legislation faces a tremendous challenge in nearly all jurisdictions which have passed such laws, either due to the large percentage of unsubstantiated reports, or a reluctance in reporting. Empirical research shows that universal mandatory reporting could, on the one hand, help boost reporting by non-professionals, but could also significantly increase the rate of unsubstantiated reports, especially by non-professionals.⁶ In 2019, among the 4.4 million referrals for maltreatment of children in the USA, 56.5% of them were unsubstantiated.⁷

Compliance with such legislation is perhaps more challenging for developing nations with longstanding practices unfriendly to mandatory reporting procedures, such as lack of infrastructure and trained personnel, combined with unfavourable cultural nuances. A delicate balance is needed when choosing the requisite legislative model. In the last ten years, India and China have made tremendous legislative efforts in introducing mandatory reporting for child abuse. However, the legislative models of the two countries vary significantly. Parts II and III of the paper detail the legislative history of mandatory reporting of child sexual abuse in the two countries, their legislative provisions, and their implementation challenges. Part IV of the paper delves into a comparative analysis of the divergence in the legislative models based on their legislative provisions and their implementation challenges. It also distinguishes their legislative models through the lens of rule change versus cultural change, since the success of mandatory reporting is deeply rooted in the willingness of people to report.

II. LEGISLATIVE EVOLUTION AND ITS IMPLEMENTATION FOR MANDATORY REPORTING IN CHINA

The institutionalisation of mandatory reporting for child abuse in China has taken place through careful and conscious step-by-step efforts. This part of

⁶ Grace WK Ho, Deborah A Gross and Amie Bettencourt, 'Universal Mandatory Reporting Policies and the Odds of Identifying Child Physical Abuse' (2017) 107 *American Journal of Public Health* 709. "Results: Rates of total and confirmed physical abuse reports did not differ by UMR status. Non-professionals were more likely to make reports in UMR states compared with states without UMR. Probability of making a confirmed report was significantly lower under UMR; this effect almost doubled for non-professionals compared with professional reporters."

⁷ Children's Bureau, 'Child Maltreatment 2019: Summary of Key Findings' (*Child Welfare Information Gateway*, April 2021) <<https://www.childwelfare.gov/pubs/factsheets/canstats/>> accessed 19 January 2022, 2.

the paper discusses the legislative evolution and implementation of mandatory reporting in China through five sections: (A) the early stage of raising cultural awareness for intervening in child maltreatment in the family and beyond; (B) the transitional stage of differentiating Actors with Duties to Children ('ADC') and Ordinary Actors ('OA') through abstract judicial interpretation; (C) the legislative formalization of mandatory reporting with mild legal sanctions; (D) the implementation efforts driven by the Supreme People's Procuratorate; and (E) the challenges ahead in the implementation of mandatory reporting. It is worthy of note that the legislative process of mandatory reporting in China is through policy experiments and a practice-driven process, so challenges in implementation arise at every stage, and have paved the way for development of legislation.

A. Resetting the Public Role for Parent-Child Relationships by Giving Rights (1990-2012)

After signing the United Nations Convention on the Rights of the Child 1989 ('CRC') in 1990, China passed the PRC Law on Protection of Minors ('LPM') to implement the CRC. There was no mention of mandatory reporting in the LPM. However, the legislature did realize the important role of the public in child protection, and the LPM gave society some rights to intervene in instances of child rights violations. This is reflected in Article 5(3) in the LPM, "*For behaviours violating the rights of a minor, any unit or individual has the right to discourage, stop or file a report with competent authorities.*"⁸ The rationale for taking this approach was the almost absolute authority that parents have over their children in Chinese traditional culture, which remains an entrenched perception in modern society. Although this provision did not create a law on mandatory reporting, it did act as a basis for cultural change. Amendments were made to the LPM in both 2004 and 2006, but there was no amendment to Article 5(3).

B. Differentiating ADC and OA for Mandatory Reporting through Abstract Judicial Interpretation (2013-2015)

The formal rules for mandatory reporting were first institutionalized for child sexual abuse cases by an abstract judicial interpretation titled 'Opinion on Punishing Sexual Abuse of Minors'⁹ ('OPSAM') on October 23, 2013. The

⁸ Full text in Chinese is available here <<https://www.cecc.gov/resources/legal-provisions/law-on-the-protection-of-minors-chinese-text>> accessed 11 November 2022. (Competent authority here is not defined. In practice, people may report to any organization or agency with public power or public function such as Women's Federation, Youth League, Village Committee or to the education authority, policy authority or other public authority.)

⁹ Full document available at Supreme People's Procuratorate, <https://www.spp.gov.cn/zd gz/201310/t20131025_63797.shtml> accessed 24 January 2022.

Supreme People's Court ('SPC') has the power of issuing abstract judicial interpretation, which is in the nature of rule-making.¹⁰ In addition to the SPC, another body of judicial nature, called the Supreme People's Procuratorate¹¹ ('SPP') also possesses the power of issuing abstract judicial interpretations. These abstract judicial interpretations are binding on lower courts and lower procuratorate bodies. To enhance the implementation of the law, the SPC and SPP usually invite other agencies to join them in the promulgation of abstract judicial interpretations.

The key actors for effective implementation of OPSAM are judges, prosecutors, lawyers, and police. Accordingly, it was issued by the SPC along with the SPP, the Ministry of Public Security ('MPS', which supervises the police), and the Ministry of Justice ('MOJ', which supervises lawyers). The idea and the draft of the OPSAM is led by the SPC, which also takes the lead in juvenile justice policy experiments. Article 9 of OPSAM provides that:

"For personnel bearing special responsibilities to minors, such as supervision, education, training, assistance, care or medical treatment, as well as other citizens and entities, if finding that a minor has been sexually abused, they have the right and the duty to make a report to the authority of public security, or people's procuratorate or people's court. (Emphasis added)"

Article 10 (1) further prescribes the duties of authorities who receive reports, which include documenting the case and initiating the investigation. This is the first time formal rules were used to differentiate ADC and OA. However, the differentiation of ADC and OA was superficial, as there was no difference in the consequences for non-reporting.

On December 18, 2014, the SPC took a further step in mandatory reporting by issuing another abstract judicial interpretation titled 'Opinion on Several Issues in Handling Guardians' Violations of Rights and Interests of Minors' ('OSIH-GVRIM')¹² jointly with the SPP, MPS and Ministry of Civil

¹⁰ Abstract judicial interpretation is different from case based judicial interpretation. In China, the SPC's role is not constitutional interpretation, but rather, to interpret the law through case-based interpretation, letters and replies, or formal abstract judicial interpretation with detailed rules to apply certain laws. So the SPC has actively used the abstract judicial interpretation power to create new rules and to constrain other powers in a delicate way. For more details, please refer to Jianlong Liu, 'Judicial Interpretation in China' in Mahendra Pal Singh and Niraj Kumar (eds), *The Indian Yearbook of Comparative Law 2018* (Springer 2019), 214; or EC Ip, 'Judicial Review in China: a Positive Political Economy Analysis' (2012) 8(2) *Review of Law & Economics* 331.

¹¹ An institution transplanted from the Soviet model, with the constitutional power of legal supervision.

¹² The full text of the judicial interpretation is available at <<https://www.court.gov.cn/fabu-xiangqing-13398.html>> accessed 24 January 2022.

Affairs ('MCA') to deal with the challenges of family dysfunction and child maltreatment. Through this opinion, SPC expanded the scope of mandatory reporting beyond sexual abuse cases to other violations by parents and other guardians. Article 3(1) of OSIH-GVRIM re-emphasizes the contents of Article 5(3) of LPM. Article 6(1) further provides that "*Where organizations such as schools, hospitals, village (residents) committees, social work establishments, and their staffs, find that minors have suffered violations by parents or other guardians, they shall promptly report the case or file a complaint to the authority of public security.*" Article 6(2) adds that "*Where other units and their staffs, or other individuals find that minors have suffered violations by parents and other guardians, they shall also promptly report the case to police, or file a complaint.*"

OSIH-GVRIM shares some common characteristics with OPSAM. It provides for a nominal universal mandatory reporting rule without punishment, but also names a list of certain ADCs as aforementioned in Article 6(1). The slight difference between the two is that OPSAM puts ADC and OA in one section, while OSIH-GVRIM separates them into two sections of one article each which makes the differentiation more explicit. There is however no consequence for non-reporting in the prescribed cases. The purpose of the two abstract judicial interpretations is to change the perception of actors working closely with children and to lay a solid foundation for later legislative efforts. This incremental strategy is influenced by cultural concerns and institutional constraints. From the cultural perspective, in the inter-agency discussion of the drafts, stakeholders, especially law enforcement agencies, raised concerns of implementation without cultural preparation. From the institutional perspective, the abstract judicial interpretation has no power to create new legal obligations beyond laws made by the National People's Congress ('NPC') and Standing Committee of National People's Congress ('NPCSC').

C. Legislating Mandatory Reporting with Legal Consequence (2015 till now)

The first law to legislate mandatory reporting was the Anti-Domestic Violence Law¹³ ('ADV Law') passed in 2015 which expanded the application of mandatory reporting to all victims of domestic violence who are without civil capacity or with limited civil capacity.¹⁴ Article 14 of the ADV Law provides that:

¹³ The full text of the law is available through the link <http://www.gov.cn/zhengce/2015-12/28/content_5029898.htm> accessed 3 January 2023.

¹⁴ The concept of capacity in civil law jurisprudence defines three degrees of civil capacity which a natural person can have: no civil capacity, limited civil capacity and full civil capacity. This in turn decides to what extent they can take responsibility for their actions related to contract, tort and other areas of civil law. Children and people with mental problems are either without civil capacity or have limited civil capacity.

“Where primary or secondary schools, kindergartens, medical establishments, villagers’ committees, urban neighbourhood committees, social service organizations, social assistance and protection organizations, welfare institutes and their employees discover in the course of their work that a person lacking civil capacity or with limited civil capacity has suffered domestic violence or might have suffered domestic violence; they shall promptly report it to the authority of public security. The authority of public security shall keep the reporter’s information confidential.”

Unlike the two abstract judicial interpretations, the ADV Law provides legal consequences for non-reporting. Article 35 provides that if the ADC, as prescribed by Article 14, fails to report the case, the competent authority shall impose disciplinary sanctions on the person who possesses primary responsibility or leadership responsibility. Article 36 also prescribes that criminal sanctions may be imposed on civil servants of state agencies if child rights violations are caused by dereliction of duty, abuse of power or favouritism. However, there are no criminal sanctions for other professionals’ reporting failure. The consequences are in the form of disciplinary sanctions, such as warnings, salary reductions, firing from the job etc.

Another progressive aspect of the ADV Law is that it prescribes the measures to be taken in dealing with the reports of domestic violence and the placement of the victims. The two sections of Article 15 of the Law prescribe the duties of authorities who receive the report. Article 15(1) provides for the timely filing of the case, investigation of the case, collecting evidence, injury assessment and timely placement for medical treatment. Article 15(2) provides that if domestic violence victims without civil capacity or with limited civil capacity are facing a threat to their life or lack of care, the police shall notify the Authority of Civil Affairs to place them in a shelter centre, assistance centre or welfare institute.

In the 2020 Revision of LPM¹⁵ (based on previous legislation), Article 11 uses three sections to prescribe actors responsible for mandatory reporting of child abuse cases. Article 11(1) is identical to Article 5(3) of LPM (1990). Article 11(2) adds governmental institutions and their staff to the existing list of ADCs as prescribed by the Anti-Domestic Violence Law. It also prescribes the following circumstances under which they are obligated to report — if they: (1) find a child is being hurt, (2) suspect a child of being hurt, or (3) find a child in a dangerous situation while performing duties. Hurt includes instances of child sexual abuse. Section 2 provides for the authorities who

¹⁵ The full text of the LPM after the 2020 revision can be accessed through the Xinhua Net publication, ‘PRC Law on Protection of Minors (2020 Revision)’ (*Xinhua Net*, 18 October 2020) <http://www.xinhuanet.com/2020-10/18/c_1126624505.htm> accessed 3 February 2022.

may receive the report, such as the police, civil affairs, or education and other proper authorities. Article 11(3) provides the duties of the receiving authority, which are similar to the duties stated previously. Additionally, Article 117 provides legal consequences for report failures by an ADC: *“If anyone doesn’t report under Article 11(2) and if non-reporting causes serious consequences, the relevant institution, organization or individual shall face disciplinary sanctions by the competent authorities.”* Article 128 provides the same content as Article 36 of the ADV Law.

The LPM (2020 Revision) and ADV Law (2015) share some commonalities, such as i) differentiating ADC and OA in reporting duties, ii) only punishing ADC for non-reporting (‘punishable mandatory reporting’), iii) mainly turning to disciplinary sanctions as sanctions for non-reporting, and iv) prescribing receiving authorities to create incentives for reporting, by ensuring that reports are taken seriously. However, the LPM (2020 Revision) differentiates ADC and OA in terms of who should report and what to report. As to who should report, LPM (2020 Revision) expands ADC to all state institutions and their staff. For what to report, LPM (2020 Revision) provides for an OA to report only on what he or she has encountered. An ADC on the other hand must report instances wherein they encounter an offence taking place, suspect that an offence has taken place or is going to take place, or in which children are suspected of being in danger.

D. Experimenting with Enforcement Measures (2018-present)

The incremental approach taken by China has been guided by the concern of implementation. In an interview regarding the feasibility of introducing mandatory reporting in the ADV Law, Tong Lihua, who is a leading Chinese child rights activist, a CPC Congress Representative and also a Deputy of Beijing People’s Congress, mentioned that *“It is very necessary to have mandatory reporting for the early identification of child abuse. But it is also important to prescribe the right scope of mandatory reporters by neither neglecting the necessary actors nor creating dilemmas of implementation for being too ambitious.”*¹⁶

Even though the law is incremental in nature and conscious of cultural preparation, it still faces challenges as child abuse reporting is not usually a priority for enforcement agencies while facing multiple tasks. This makes it necessary to ensure some additional effort at the implementation stage. Usually, after a legislation is passed in China, the provincial government needs to enact local acts, or the SPC and SPP need to enact abstract judicial

¹⁶ People’s Daily, ‘Calling Upon the Introduction of Mandatory Report to Anti-Domestic Violence Law’ (15 April 2015) <<http://politics.people.com.cn/n/2015/0415/c70731-26846707.html>> accessed 27 January 2022.

interpretations for implementation of the law. On December 24, 2018, Yunnan Provincial Government issued 'Implementation Measures for Mandatory reporting in the Anti-domestic Violence Law,' thereby becoming the first provincial government to enact a regulation on how to enforce mandatory reporting. However, the institutionalization of regulations across the country remains scant.

As a result, SPP becomes the national leading agency to promote the implementation of mandatory reporting across the country. In early 2019, SPP started pilot programmes in some cities of Zhejiang, Jiangsu, Hubei, and Jiangxi Provinces to prepare for the national policy on implementation of mandatory reporting for child abuse.¹⁷ At the end of 2019, the SPP organized experts to evaluate the pilot programs, and decided to issue an abstract judicial interpretation to institutionalise pilot implementation efforts. On May 29, 2020, after efforts made by the SPP, eight other national agencies joined the SPP to issue 'Opinions on Mandatory reporting for Child Cases (For Trial Implementation)' ('OMRCC').¹⁸ Since OMRCC was enacted before the passing of the LPM (2020 Revision), it acted as a guideline for nationalising the implementation measures for ADC's mandatory reporting and also as a driving force for pushing mandatory reporting to be written into the LPM 2020 Revision.

Article 3 of the OMRCC lists the actors punishable for non-reporting under mandatory reporting requirements. These actors are: (1) state institutions and organizations, their employees authorized to exercise power by laws; (2) rural or urban neighbourhood committees; (3) educational institutions including primary and secondary schools, kindergarten and other education training institutions, organizations for outdoor child services and school bus service providers; (4) child day care centres; (5) medical units including hospitals, maternal and child health hospitals, emergency centres, medical clinics; (6) child social welfare entities including child welfare institutions, child assistance institutions, child protection institutions, social workers' institutions; and (7) hotels and guest houses.

Further, Article 4 of the OMRCC illustrates nine circumstances in which reporting is mandatory: (1) finding an injury to sex organs or other private parts of a child; (2) girls under the age of 14 suspected of having been sexually abused or of undergoing a pregnancy or an abortion;¹⁹ (3) girls aged 14

¹⁷ People's Daily, 'Nine Types of Child Rights Violations are under Mandatory Reporting' (29 May 2020) <<https://wap.peopleapp.com/article/5544631/546451>> accessed 23 February 2022.

¹⁸ Supreme People's Procuratorate <https://www.spp.gov.cn/spp/xwfbh/wsfbt/202005/t20200529_463482.shtml#1> accessed 27 January 2022.

¹⁹ The age of sexual consent in China is 14. If a girl under the age of 14 has sex it would be presumed she has been raped. Then it needs state intervention. Girls who have been sexually abused can still get access to reproductive services but the state must know. There is only one exception: when girls between the age of 12 and 14 have sex consensually with boys between the age of 14 and 16 their relationship might not be defined as a rape. China's age of consent

or above undergoing pregnancy or abortion; (4) finding a child suffering from multiple physical injuries, serious undernutrition, or mental problems; (5) abnormal disability or death of a child; (6) a child being abandoned or lacking due care for long; (7) finding an unidentified child, child disappearance, or child being trafficked or bought; (8) finding a child engaged in begging; (9) other circumstances of a child being hurt seriously or in immediate danger. Article 5 and 6 provide the procedure for communication between organisational actors responsible for punishable lapses in mandatory reporting and their employees. Article 7-14 prescribe the detailed procedure for authorities to receive such reports. It is pertinent to note that those reporters are not held liable for reports that are found to be false, while anyone preventing or discouraging reporting by actors mandated to do so, is liable to be punished according to Article 15. Article 16 provides that punishment for report failure could be either disciplinary sanctions or even criminal sanctions if the act violates other criminal law. Other provisions of the OMRCC focus on measures for improving inter-agency collaboration for mandatory reporting, changing the attitude of bureaucrats towards mandatory reporting, and efforts for capacity building for better implementation of mandatory reporting.

In addition to the issuing of OMRCC, the SPP has made additional efforts for improving implementation of the law, such as publishing case studies on mandatory reporting for three consecutive years from 2020 to 2022. In the publication of the first report on May 29th 2020, it highlighted one failed case and four successful cases.²⁰ A girl was molested by a school security guard. Her relative reported the case to the school, which asked the security guard to pay 30,000 RMB (approximately 3,50,000 Indian Rupees) and settled the case. The girl was not satisfied with the settlement and filed a complaint with the police. The case showed that the school knew about the commission of an offence but did not report the crime to the police. The local Procuratorate actively engaged in the prosecution process, which resulted in the perpetrator being sentenced to imprisonment of two years and three months. In addition, the local Procuratorate sent judicial recommendations to the local education authority, which included: expanding background check of new employees including supportive staff, increasing the school's capacity of early identification of child abuse cases, conducting trainings of teachers for mandatory reporting, disciplinary sanctions for teachers and administrators for non-reporting. The remaining four cases demonstrated successful reporting of offences by doctors and teachers, and successfully helped identify child abuse committed by family members and others. For example, a couple meted out corporal punishment to their 10 year old child by means of physical abuse which

is very low, and has been criticized for the weak protection it offers to children. But the Indian one at the age of 18 might be too high.

²⁰ Supreme People's Procuratorate, 'Typical Cases for Mandatory Report related to Child Rights Violations' (29 May 2020) <http://www.nwccw.gov.cn/2020-06/03/content_284771.htm.> accessed 24 January 2022.

left the girl critically injured. When they sent the girl to hospital, the doctor suspected that the injuries had been intentionally inflicted and reported it to the police. The police started a criminal investigation and found the parents had frequently abused the girl. This led to the parents being sentenced for the habitual child abuse meted to their child.

On May 31, 2021, the SPP published its second case study, featuring a single case in which report failure was punished.²¹ The case dealt with non-reporting of sexual abuse by the Principal and Vice-Principal of a school, who faced criminal sanctions for non-reporting. The case study is similar to the case study from the 2020 Report but the principal and vice-principal in the 2020 case study only got disciplinary sanctions. This sent a strong signal to stakeholders and employees responsible for mandatory reporting that the law must be taken seriously.

On May 27, 2022 the SPP launched another case study of instances where criminal sanctions were imposed for non-reporting. This included a case in which the hotel failed to verify guests' ID which led to a girl under the age of 14 years being sexually abused in the hotel, a case in which medical clinics failed to report a teenage girl's pregnancy, and a case in which school administrators didn't report a teacher's sexual abuse of a student.²² In the case involving the hotel, the punishment was a fine of 20,000 RMB (2,00,000 Indian Rupees) and suspension of business for one month. In addition, the local Procuratorate also sent judicial recommendations to the local police authority. As a response, the local policy authority organized 200 hotel managers and owners of the county (similar to an Indian "district") for a training programme on the mandatory reporting law.

The publication of typical cases by the SPP is very strategic. Firstly, it chooses the best time of the year to get media attention, which is mostly the week before the "National Children's Day" (June 1st). Secondly, it usually publishes case studies depicting both mandatory reporting best practices and failures of non-reporting, which enables stakeholders to understand the dos and don'ts of mandatory reporting clearly. Thirdly, through the case studies we see that the SPP does not just care about the handling of the case, but also about issuing comprehensive judicial recommendations for preventive measures such as mandatory trainings for the relevant stakeholders, suggesting that schools incorporate criminal background checks in the hiring process etc.

²¹ Supreme People's Procuratorate, *SPP: Every Violation of Mandatory Reporting Would be Investigated* <http://www.xinhuanet.com/2021-05/31/c_1127514771.htm> accessed 26 October 2022.

²² Supreme People's Procuratorate, *Typical Cases for Punishing Report Failures* (27 May 2022) <https://www.spp.gov.cn/spp/xwfbh/wsfbt/202205/t20220527_557995.shtml#2> accessed 26 October 2022.

In addition to the publication of case studies centred around the public and ADCs, the SPP has also tried to document and promote innovative pilot programs. For example, the Huangdao District of Qingdao City opened a special helpline for mandatory reporting to the police department with specialized personnel to answer incoming calls.²³ The specialists in turn issue recommendations to relevant stakeholders based on the case pattern analysis. For example, when they found that the reports were mainly around cases where young girls were taken to hotels by strangers or familiar persons to have sex, the authority of public security in Huangdao District suggested that the Qingdao City Authority of Public Security should send a city-wide policy recommendation to more than a thousand hotels for training on the mandatory reporting.²⁴ Ji along District of Chongqing developed a mandatory reporting application, which enables the reporter to upload evidence to the police authority; it also enables the local procuratorate to supervise the police's handling of the report.²⁵

Furthermore, the SPP also uses its institutional power to mobilize other stakeholders to join the efforts of raising the public's awareness for mandatory reporting. In September 2020, SPP collaborated with China Central Television, (the most popular nationwide Chinese TV broadcaster) to make an informational TV series on mandatory reporting.²⁶ During the National People's Congress Session in 2022, enforcement of mandatory reporting was one of the highlighted parts of the SPP's annual report to the National People's Congress.²⁷ Further, it also allocated its existing national call number 12309 as the one to receive complaints under mandatory reporting.²⁸

²³ Lu Jinzeng, Dong Huizhu, and Yu Hongyan, *Qingdao Opens 110 Special Line for Child Mandatory Report* (*Procuratorate Daily*, 3 December 2021) <http://newspaper.jcrb.com/2021/20211203/20211203_001/20211203_001_7.htm> accessed 3 February 2022.

²⁴ *ibid.*

²⁵ Chen Guozhou, 'Mandatory Report App for Better Child Protection' (Xinhua Net, 3 August 2020) <http://www.xinhuanet.com/legal/2020_08/03/c_1126316362.htm#:~:text=%E5%B6%E6%8A%A5%E5%91%8AApp%E6%98%AF%E4%B8%80%E4%B8%AA%E8%BF%99%E4%B8%80%E8%BF%87%E7%A8%8B%E5%85%A8%E7%A8%8B%E7%B%91%E7%9D%A3%E3%80%82> accessed 3 February 2022.

²⁶ *Law In-depth Program on Mandatory Reporting for Strong Child Protection (I)* (6 September 2020) <https://www.spp.gov.cn/spp/qzbg/202009/t20200906_519483.shtml> accessed 9 March 2022; <<https://tv.cctv.com/2020/09/12/VIDEOPRHQ4pW1XHhnj9JwEV0200912.shtml>>; *Law In-depth Program on Mandatory Reporting for Strong Child Protection (II)* (13 September 2020), <https://www.spp.gov.cn/spp/qzbg/202009/t20200913_519482.shtml> accessed 9 March 2022; "'Deep Rule of Law" Mandatory Reporting System: Strong Protection of Minors (Part 2)' <<https://tv.cctv.com/2020/09/12/VIDEOPRHQ4pW1XHhnj9JwEV0200912.shtml>> accessed 9 March 2022.

²⁷ *SPP Chief Delivered Annual Report to National People's Congress*, March 8, 2022, <https://www.12309.gov.cn/llzw/yw/202103/t20210308_511686.shtml> accessed 9 March 2022.

²⁸ SPP, *Protecting Every China Around Us*, 9 March 2022, <http://www.chinapeace.gov.cn/chinapeace/c100007/2022-03/09/content_12604513.shtml#:~:text=%E6%A3%80%E5%AF%9F%E5%AE%98%E6%8F%90%E7%A4%BA%E6%82%A8%EF%BC%8C%E5%BC%BA%E5%88%B6,%E6%8B%A8%E6%89%9312309%E6%A3%80%E5%AF%9F%E6%9C%8D%E5%8A%A1%E7%83%AD%E7%BA%BF%E3%80%82> accessed 9 March 2022.

The efforts led by the SPP have garnered immense attention on mandatory reporting law within a short period of time. Within three months after the effective implementation of OMRCC, 500 cases were filed across the country under mandatory reporting.²⁹ In 2021, there were 1657 child rights violation cases identified through mandatory reporting, and in 459 cases, ADCs were punished for non-reporting. The graph below³⁰ shows the sharp increase in awareness of mandatory reporting by the law enforcement agencies such as authorities of public security, education, civil affairs and procuratorate, based on Baidu Search. The table below shows that the sharp increase in awareness started in 2019 when the SPP started the mandatory reporting enforcement pilots. Instead the awareness was very low in 2016 when the first law mandating child abuse reporting with legal sanctions took effect. It shows that the law itself is not necessarily effective for increasing awareness among law enforcement agencies, but dedicated law enforcement efforts matter more.

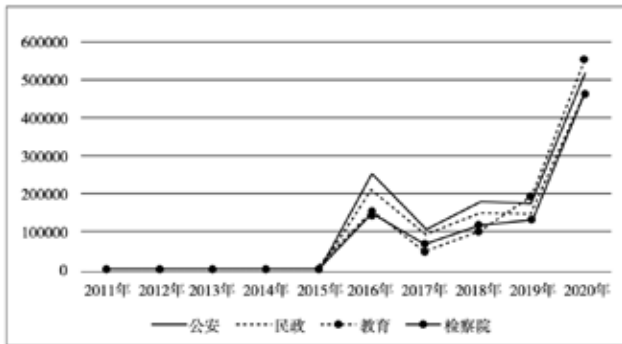


图2 未成年人保护强制报告关注程度

资料来源：根据百度搜索结果整理所得。

E. Implementation Challenges Ahead

In terms of legislative content, the legislation is well developed but there is minuscule attention to the problem of child pornography; legislation does not highlight the role of media, film industry or even high-tech companies as important mandatory reporting actors.

In addition, there are also other direct implementational challenges ahead. Even though concern around implementation has been the driving force for

²⁹ Wei Xi, *More Supportive Measures in Need for Mandatory Report* (*China Youth Daily*, 13 October 2021) <http://zqb.cyol.com/html/2021-10/13/nw.D110000zgqnb_20211013_1-07.htm> accessed 3 February 2022.

³⁰ Fuhai Xu, *Mandatory Reporting for Child Protection: Practice and Future Choice* (2021) 5(3) *Chinese Social Security Review* 102.

the legislative process, there are still evident implementational challenges ahead. Firstly, awareness on mandatory reporting even among professionals is still low. According to a survey conducted in Beijing in December 2020, about 45% social workers and 30% of “Child Ombudsmen”³¹ in villages and urban neighbourhood committees were not aware of mandatory reporting law.³² Even among teachers and doctors, the percentage of those aware of mandatory reporting was lower than expected, given that these professionals interact with children on a regular basis.³³ Empirical data shows that the cases identified through mandatory reporting are still low in China, at just around 2.97% during the period from June to September 2020.³⁴

Cultural factors are also reflected in views involving mandatory reporting. Among the persons aware of the mandatory reporting law, there are some who are reluctant to report since they are not sure if reporting is beneficial for child victims.³⁵ Empirical research also highlights that the public is more tolerant of parents’ violence towards children, compared to violence perpetrated by a stranger; people prefer reporting violent behaviour toward children rather than non-violent behaviour; parents comprise the main reporting body while reports from strangers are still low.³⁶

In addition to awareness, there are also institutional barriers preventing the effective implementation of the law. For example, even though the police department and the SPP have separate national hotlines which receive mandatory reporting complaints, these hotlines run either by police departments or procuratorates at different levels are not integrated and also lack professionals to answer, screen and make referrals for cases.³⁷ The coordination among different institutions for investigation, provision of supportive services to child victims and their families, and the shelter placement of child victims is also weak.³⁸ There are multiple authorities charged with receiving reports, which causes confusion for reporting actors.³⁹

³¹ Child Ombudsmen are persons appointed in the urban or village community to take care of the welfare and rights of children, in a practice that was developed through pilot programmes.

³² Guo Hongping, ‘What Are the Pains to Enforce Mandatory Reporting?’ (2021) 17 *Fang Yuan* 36.

³³ *ibid.*

³⁴ Lan Yuejun and Li Xinyu, *The Challenges and Possible Solutions for the Law Enforcement of Mandatory Report* (2021) 6 *China Youth Social Science* 128, 130.

³⁵ *ibid.* For example, if the case was handled by non-professionals the child victim might be retraumatized in the judicial process.

³⁶ Du Yaqiong and Cao Yueyue, ‘Probing the Child Protection Practice through Mandatory Report in China’ (2022) 1 *Child and Juvenile Studies* 22.

³⁷ Gu Jin, ‘Mandatory Report: Judicial Practice and Future Choice’ (2021) 12 *Theory Studies*, 67.

³⁸ *ibid.*

³⁹ Yuejun and Xinyu, (n 34) 131.

In summary, the Chinese implementational challenges ahead mainly deal with the fragmentation of different pilots, sustaining the current commitment of implementation innovations and making the law of mandatory reporting mainstream across the general public and law enforcement actors.

III. MANDATORY REPORTING IN INDIA: LEGISLATIVE HISTORY AND IMPLEMENTATION

Mandatory reporting under Indian law dates back to 1882, when it was incorporated into the Code of Criminal Procedure, 1882 ('CrPc 1882') under Section 44.⁴⁰ Section 44 of the CrPc 1882 made it mandatory for the public to report certain offences under the Indian Penal Code, 1860 ('IPC') such as offences against the state, illegal gratification, robbery, and murder. This provision was also carried into the Code of Criminal Procedure, 1973 ('CrPC') as Section 39.⁴¹ Intentional non-reporting of such offences was made punishable under Section 202 of the IPC. The punishment extends to a maximum of six months or a fine or both. This, however, did not include offences pertaining to sexual assault, or any other offences pertaining to children/child abuse. Mandatory reporting for child abuse, specifically child sexual abuse, was introduced nationally in 2012 via the Protection of Children from Sexual Offences Act, 2012 ('POCSO'). The POCSO mandated reporting of instances of child sexual abuse to relevant authorities by all members of the public. This also extends to consensual sexual activity between minors, as the age of sexual consent under the POCSO is 18 years. Further, in 2013, an amendment was made to the CrPc which mandated reporting of sexual offences and acid attacks by hospitals (both public and private) to the police.⁴² The Juvenile Justice (Care and Protection of Children) Act, 2015 also extended mandatory reporting to children found without their guardians to the police, the child welfare committee etc.⁴³ This section of the paper will discuss the legislative history of mandatory reporting with regard to child sexual abuse in India, how it stands today and the practical applicability of the provision, including its limitations.

A. Mandatory reporting for child sexual abuse before POCSO

Mandatory reporting for child sexual abuse was incorporated in Indian law for the first time in 2003 by the state of Goa via the Goa Children's Act, 2003 ('Goa Act'). The Goa Act, under Section 8(14), mandates developers of photographs or films to report to the Officer-in-Charge of the nearest police station

⁴⁰ Code of Criminal Procedure 1882.

⁴¹ Code of Criminal Procedure 1973, s 39.

⁴² Code of Criminal Procedure 1973, s 357-C.

⁴³ Juvenile Justice (Care and Protection of Children) Act, 2015, s 32.

if they find that the photos/films developed by them contain sexual/obscene depictions of children. Failure to report such a discovery carries a maximum punishment of three years and/or a minimum penalty of INR 50,000.⁴⁴ Further in 2005, the Goa Act was amended to also include mandatory reporting of (a) child abuse or (b) an adult travelling with or keeping a child under suspicious circumstances or (c) sale of children or (d) sexual offence with a child or (e) child trafficking by the district police, airport authorities, border police, railway police and traffic police, to the Officer in-charge of the nearest police station under Section 8(15).⁴⁵ However, non-reporting under Section 8(15) is not an offence and does not attract a penalty.

The mandatory provisions under the Goa Act criminalized the non-reporting of pornographic film content and mandated reporting of other child abuse incidents without criminalisation. However, both the mandatory provisions under the Goa Act cast the responsibility only on certain groups of people and public servants, and excluded the public.

In the year 2012, mandatory reporting for child sexual abuse was introduced centrally via the Protection of Children from Sexual Offences Act, 2012 ('POCSO'). POCSO engendered a formal legal framework specifically for the protection of children against sexual offences. The primary object of the legislation was to criminalise offences of sexual assault, sexual harassment, and pornography against children⁴⁶ and fill gaps in the IPC with regard to provisions relating to sexual abuse of children, which was not specifically defined in the IPC at the time.

B. Mandatory reporting under POCSO

Prior to the POCSO being passed by the Parliament, the POCSO bill was analysed by the Parliamentary Standing Committee on Human Resource Development ("Committee"). The Committee, after duly noting the considerable academic debates on mandatory reporting and concerns of various stakeholders, stated in bold that such a provision "cannot be considered practical."⁴⁷ The Committee received suggestions to make mandatory reporting specific to stakeholders, such as childcare custodians; health or medical practitioners; employees of child protection agencies such as Childline; Juvenile Justice Functionaries; commercial film and photographic print processors; any establishment employing persons below 18 years of age, which it found

⁴⁴ Goa Children's Act, 2003, s 8(14).

⁴⁵ Goa Children's Act, 2003, s 8(15).

⁴⁶ The Protection of Children from Sexual Offences Act, 2012, Preamble.

⁴⁷ Department-related Parliamentary Standing Committee, *240th Report on The Prohibition of Child Sexual Offences Act, 2012* (December 2011) 22. <https://prsindia.org/files/bills_acts/bills_parliament/2011/SCR_Protection_of_Children_from_Sexual_Offences_Bill_2011.pdf> accessed 9 January 2022.

to be justified.⁴⁸ This suggestion was similar to laws prevalent in other jurisdictions which restricted mandatory reporting only to those professionals who regularly interact with children, such as in China. The committee thereafter recommended the deletion of clause 21(1) from the bill and the redrafting of clause 21(2),⁴⁹ both of which related to criminal punishment (imprisonment) for non-reporting by the public and heads of institutions respectively. The clauses were however retained, and a rationale for it was visible in the model guidelines framed by the Ministry of Women and Child Development, which states that the purpose of mandatory reporting is twofold: 1) prevent children from suffering further harm without reporting⁵⁰ and 2) without intervention, children may remain victims forever and may never be able to disclose or stop their abuse by themselves.⁵¹

The POCSO differs from statutes in other countries since it extends mandatory reporting to all persons, unlike many jurisdictions such as Australia⁵² and the USA (in most states) wherein such mandatory reporting is only limited to certain groups of persons who work with children, or are in a position of authority/trust, such as teachers, social workers and doctors.⁵³ This, coupled with the fact that non-reporting is a punishable offence, makes it one of the heavier provisions among its international counterparts.

The POCSO contains many guidelines relating to protection of child victims during reporting and trial, such as provision of free emergency medical care, appointment of support persons for child victims and setting up of special POCSO courts. One such protection is mandatory reporting under Sections 19, 20 and 21. Section 19 mandates any person who has apprehension that an offence under POCSO may be committed or has been committed to inform the Special Juvenile Police Unit⁵⁴ or the local police.⁵⁵ Section 20 further puts the onus on media, studio, and photographic facilities to report cases. It states that any media personnel or employee of a hotel, lodge, hospital, club, studio or

⁴⁸ *ibid.*, 23.

⁴⁹ *ibid.*

⁵⁰ Ministry of Women and Child Development, Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012 (September 2013) 73. <<https://wcd.nic.in/sites/default/files/POCSO-ModelGuidelines.pdf>> accessed 8 January 2022.

⁵¹ *ibid.*

⁵² Western Australian Government, 'Mandatory reporting of Child Sexual Abuse in WA' (Western Australia Government, 2 February 2023) <<https://www.wa.gov.au/service/community-services/community-support/mandatory-reporting-of-child-sexual-abuse-wa>> accessed 21 February 2023.

⁵³ Children's Bureau, *Mandatory Reporters of Child Abuse and Neglect* (Child Welfare Information Gateway, April 2019) 2. <<https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda/>> accessed 24 January 2022.

⁵⁴ The Special Juvenile Police Unit must be formed in each district under s 107 of the Juvenile Justice (Care & Protection of Children) Act, 2015 to coordinate all functions of police related to children amongst various stakeholders within the system.

⁵⁵ The Protection of Children from Sexual Offences Act 2012, s 19.

photographic facility who comes across any material or object which is sexually exploitative of a child (including pornographic, sexually-related or obscene representations of a child or children) through any medium must report the same to the Special Juvenile Police Unit, or to the local police.⁵⁶ POCSO also goes on to criminalise non-reporting of an offence by adults and provides the punishment for non-reporting under Section 21. The punishment is a maximum of six months imprisonment and/or fine for citizens, but the same extends up to one year and fine in cases where non-reporting is by the person in-charge of any company or an institution.⁵⁷ It is pertinent to mention that as per Section 21(3), the punishment does not apply to children.⁵⁸ Lastly, POCSO does not criminalise reports that may turn out to be “false” if the same has been made in good faith.⁵⁹ However, if a false report: 1) is made for offences of sexual assault, aggravated sexual assault, penetrative sexual assault or aggravated penetrative sexual assault solely with the intention to humiliate, extort or threaten or defame, the reporter shall be punished with imprisonment for a maximum of six months and/or with fine⁶⁰ and; 2) provides false information against a child, knowing it to be false, thereby victimizing such child, the reporter is punishable with imprisonment, which may extend to one year and/or with fine.⁶¹

C. Implementation of mandatory reporting

Studies have shown that not many cases have been reported through mandatory reporting. This conclusion can be drawn from data concerning the complainants in POCSO cases. Studies conducted by CCL-NLSIU on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra, Assam and Andhra Pradesh show that most reporting has been done by parents and the child victim in cases under POCSO.⁶² Cases have rarely been reported to the police by professionals or persons who are not related to the child victim.⁶³ Below are some statistics from the CCL-NLSIU⁶⁴ study:

⁵⁶ The Protection of Children from Sexual Offences Act 2012, s 20.

⁵⁷ The Protection of Children from Sexual Offences Act, 2012, s 21.

⁵⁸ *ibid.*

⁵⁹ The Protection of Children from Sexual Offences Act 2012, s 19(7).

⁶⁰ The Protection of Children from Sexual Offences Act 2012, s 22(1).

⁶¹ The Protection of Children from Sexual Offences Act 2012, s 22(3).

⁶² Centre for Child and the Law, ‘An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children’ (National Law School of India University, 15 June 2018).

⁶³ *ibid.*

⁶⁴ *ibid.*

Table 1

	Parent	Victim	Relatives	Others
Assam	80%	11%	8%	1%
Maharashtra	48%	41%	7%	2%
Andhra Pradesh	48%	43%	6%	3%

Further, a study conducted in the state of Maharashtra by a non-governmental organisation called Aarambh⁶⁵ has also shown that not many persons have been charged for non-reporting under Section 21 by police personnel. Only 5% of police respondents stated that they have booked persons under POCSO for non-reporting and only 3% have heard of anyone being booked under POCSO for non-reporting.⁶⁶ However, most government personnel such as police officers, public prosecutors and Child Welfare Committees⁶⁷ ('CWCs'), District Child Protection Units⁶⁸ were in favour of the mandatory reporting provision.⁶⁹ It is also pertinent to note that ten out of 16 (62%) CWCs felt that all POCSO cases should be reported to police, while six did not respond.⁷⁰ In contrast, most hospital personnel were not in favour of mandatory reporting.⁷¹ Some of the reasons they stated ranged from stigmatisation of the female child involved, mandatory reporting acting as an obstruction for providing medical services such as abortion, especially in cases where sexual acts were consensual, the unwillingness of families to report, children reaching sexual maturity earlier and lack of awareness about the law.⁷²

D. Implementation Challenges

1. *Lack of Guidelines on the Application of Mandatory Reporting*

During drafting, civil society organisations were in favour of mandatory reporting. However, they "emphasised a need for mandatory reporting to be qualified."⁷³ They stated that there is a need for guidelines in cases wherein

⁶⁵ Praveen Patkar and Pooja Kandula, '4 Years Since POCSO: Unfolding of the POCSO Act In the State of Maharashtra' (*AarambhIndia*, 7 March 2018) <<http://aarambhindia.org/4-years-since-pocso-maharashtra/>> accessed 9 February 2022.

⁶⁶ *ibid.*, 74-75.

⁶⁷ Child Welfare Committees must be formed in each district under s 27 of the Juvenile Justice (Care & Protection of Children) Act, 2015. Their role is to pass orders and hold enquiries for children in need of care and protection such as child sexual abuse victims.

⁶⁸ District Child Protection Units must be formed in each district under s 27 of the Juvenile Justice (Care & Protection of Children) Act, 2015. They are the focal points to ensure the implementation of the Act and other child protection measures in the district. See CCL (n 62).

⁶⁹ *ibid.* 76, 110, 164.

⁷⁰ *ibid.* 165.

⁷¹ *ibid.* 227.

⁷² *ibid.* 227-228.

⁷³ *ibid.* 245.

parents are not willing to report, a need for awareness and system strengthening, limitation of reporting to heinous crimes only, and a system for rewarding schools for reporting instead of punishing them. India's cultural and family norms may also create hurdles for mandatory reporting.

The POCSO does not provide guidelines on mandatory reporting either in the Act itself or the Protection of Children from Sexual Offences Rules, 2020 (or the erstwhile rules of 2012) and the legislature/government bodies have been unable to provide clarity on the nuances and the allied challenges of mandatory reporting. It has been left to the judiciary to interpret the sections and create guidelines for mandatory reporting. The Supreme Court in the case of *Shankar Kisanrao Khade v State of Maharashtra*⁷⁴ laid down directions for stakeholders for compliance with Sections 19, 20 and 21 of the POCSO. The case was registered prior to POCSO, when no mandatory reporting provisions were in place, but it dealt with an instance of non-reporting of child sexual abuse by a person who witnessed the abuse. The guidelines gave directions to persons in close contact with children and the media.⁷⁵ The directions urge stakeholders to report all instances of child sexual abuse to either the Police or the Special Juvenile Police Unit in accordance with Sections 19, 20 and 21 of the POCSO.⁷⁶ The directions also mention that the best interest of the child should be of paramount consideration. Lastly, incest cases are specifically mentioned, and the directions state that if the perpetrator is a family member, then utmost care must be taken and the future course of action should be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.⁷⁷ Additionally, the Supreme Court in the recent case of *State of Maharashtra v Maroti*,⁷⁸ rejected a medical professional's plea for the quashing of an FIR that had been registered against him for non-reporting, and further emphasised the need for mandatory reporting to help police investigate an offence under POCSO swiftly and also collect medical evidence in a timely manner.⁷⁹

High Courts across the country have been firm in the application of mandatory reporting with regards to police personnel and doctors. In the case of

⁷⁴ *Shankar Kisanrao Khade v State of Maharashtra* (2013) 5 SCC 546.

⁷⁵ *ibid*, [77] (J. Radhakrishnan).

(1) persons in-charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc, or wherever children are housed (2) Media personals, persons in charge of Hotel, lodge, hospital, clubs, studios, photograph facilities (compliance with s 20 POCSO), (3) Institutions which house children with intellectual disability or persons in care and protection (4) Government or privately owned or medical institutions (5) NCPCR, S.C.P.C.R. Child Welfare Committee (CWC) and Child Helpline, NGOs or Women's Organizations.

⁷⁶ *ibid*.

⁷⁷ *ibid*.

⁷⁸ *State of Maharashtra v Maroti* (2023) 4 SCC 298.

⁷⁹ *ibid*, [15]

Prahlad Sharma v State of Rajasthan,⁸⁰ both the police and hospital failed to register a complaint and treat the child respectively. The High Court of Rajasthan held both police officials and doctors liable for non-reporting despite both officials being investigated through departmental enquiries. The court further stated that “When Parliament by amendment has purposely introduced Sections 166A⁸¹ and 166B⁸² in the IPC and made this inaction/omission as provided for by Section 19 of the Act of 2012 as the offences under Section 21, there is no reason why the guilty officials should not be proceeded against for determination of their criminal liability.”⁸³

Similarly in the case of *Ajitha v State of Kerala*,⁸⁴ in which a doctor in private practice failed to report the instance of child abuse after the victim and her mother had disclosed the abuse to her, the High Court of Kerala held the doctor liable and further stated that doctors, being public servants, are more liable than others to report under Section 19(1) of POCSO.⁸⁵ Similarly, in the aforementioned case of *Maroti*,⁸⁶ the Supreme Court set aside the Bombay High Court’s decision to quash an FIR against a doctor to whom children had disclosed systematic abuse in an institution, which was not reported.

The courts have also tried to lend some clarity to Section 19(1) of POCSO with regards to mandatory reporting when there is an apprehension that an offence has been committed. In the case of *Bineeta Chakraborty v State of Karnataka*,⁸⁷ the High Court of Karnataka held that “An analytical reading of Section 19 of the Act makes it clear that any person who has apprehension about commission of the offence or the possibility of such offence, is duty bound to furnish information to the concerned as enunciated at Subsection (1) of Section 19.”⁸⁸ The court also stated that to charge persons under Section 21 in case of apprehension requires factual evidence. Further, in the case of *Tessy Jose v State of Kerala*.⁸⁹ The Supreme Court, while acquitting two doctors on the charge of mandatory reporting, held that mere likelihood of suspicion of the accused having knowledge of an offence under POCSO is insufficient to make out a charge under Section 21 and evidence must indicate at least grave suspicion of the accused having knowledge of the offence.⁹⁰

⁸⁰ *Prahlad Sharma v State of Rajasthan* (2016) 3 CDR 1089 (Raj).

⁸¹ Public servant disobeying direction under law.

⁸² Punishment for non-treatment of acid/sexual assault victim by a hospital.

⁸³ *Prahlad Sharma* (n 80).

⁸⁴ *Ajitha v State of Kerala* 2016 SCC OnLine Ker 26690.

⁸⁵ *ibid.*

⁸⁶ *Maroti* (n 78).

⁸⁷ *Bineeta Chakraborty v State of Karnataka* 2017 SCC OnLine Kar 3467.

⁸⁸ *ibid.*

⁸⁹ *Tessy Jose v State of Kerala* (2018) 18 SCC 292.

⁹⁰ *ibid.*

On the other hand, High Courts have actively overturned convictions and/or suspended the sentence under Section 21. In the case of *Pragya Prateek Shukla and Ors. v. State of Rajasthan*,⁹¹ wherein two persons were convicted under Section 21 for not reporting an instance of sexual abuse (which eventually resulted in the victim's suicide) and forcing the victim to write a confession letter, the High Court of Rajasthan overturned the conviction. The court further stated that "Incidents are not uncommon where after deliberations, it is decided in a bona fide manner not to report such matters to the police, lest the reputation of the girl is tarnished."⁹² Such a judgment entirely defeats the purpose of mandatory reporting as it goes back to archaic beliefs around women's sexuality and honour. Such reasoning is problematic and the attitude of the judiciary in this regard must be reconsidered. In another case, *Sridevi v. State*,⁹³ the victim had been sexually assaulted by her mother's boyfriend in the mother's presence; the High Court of Madras reversed the conviction of the mother of the victim under Section 21 and Section 17⁹⁴ of the POCSO by stating that "it is highly doubtful that the petitioner, being the mother, had been involved in this offence, as alleged by the prosecution."⁹⁵ In incest cases, there are more nuances involved. However, the court has been dismissive of even the idea of the involvement of the victim's mother whereas in one author's⁹⁶ experience, mothers are often aware of the abuse but may be afraid to report owing to the effects of reporting, the consequent arrest and trial. These effects range from loss of household income, societal stigma relating to sexual abuse to the struggles of being a single parent such as lack of child care and ostracization by other family members.

The judiciary has made attempts to bridge the gap between the provision and its implementation. However, without clear guidelines, the interpretation is inconsistent and insufficient and in many instances furthers stereotypes and archaic beliefs such as in the case of *Pragya Prateek Shukla*.⁹⁷ The legislature needs to provide clarity and guidance on the application of mandatory reporting while keeping in mind the ground reality and the issues being faced by stakeholders in implementation.

2. *Lack of capacity building for stakeholders*

There is a lot of stigma surrounding sex and sexual assault in the Indian context. Disclosing assault often leads to ostracization. This includes

⁹¹ *Pragya Prateek Shukla v State of Rajasthan* 2022 SCC OnLine Raj 71 .

⁹² *ibid.*

⁹³ *Sridevi v State* 2021 SCC OnLine Mad 2168.

⁹⁴ Punishment for abetment.

⁹⁵ *ibid.*

⁹⁶ One of the authors of the paper provided legal representation to child sexual abuse victims in courts in Delhi from 2017-2019. During this period, she gave/attended multiple trainings on POCSO/mandatory reporting.

⁹⁷ *Pragya Prateek Shukla* (n 91).

obstruction in the education of children and shaming of the family which leads to the family even having to move homes in certain circumstances. The Aarambh study is a testament to this stigma, wherein one of the arguments by stakeholders against mandatory reporting provisions was the stigmatization of the female child involved and the unwillingness of the family to report.⁹⁸ There is a need for age-appropriate sex education in schools and homes alike, better social awareness and normalising conversations surrounding sex and sexuality to break through this barrier. The Parliamentary committee had also mentioned both social stigma and difficulty in navigating the criminal justice system as objections to mandatory reporting.⁹⁹ While this is being taken up by civil society, concerted efforts need to be made in tandem by the government to bring awareness around sex and sex education.

Further, stakeholders are mostly unaware of the provision as seen from the Aarambh Study.¹⁰⁰ This is further exacerbated by the lack of trained personnel. There has been a concerted effort by both civil society organisations and state bodies to conduct POCSO training for police personnel, judges, teachers, medical professionals, CWC members, children and other stakeholders.¹⁰¹ However, from experience,¹⁰² these training sessions cover mandatory reporting provisions in detail, but rarely deal with the intricacies and implementation challenges related to mandatory reporting. Trainings with children and community-based organisations come with their own burden of mandatory reporting, as children and/or other stakeholders may discuss instances of disclosure of sexual abuse with trainers, which further creates a burden on trainers to report such disclosures. The Aarambh study¹⁰³ stated that “conducting POCSO awareness programmes with actual or potential victims as well as the duty bearers and service providers was full of possibilities of a close encounter with the provisions of Mandatory Reporting.”¹⁰⁴ Lastly, these trainings are not conducted often enough, as police officers, judges, special public prosecutors and those working closely on these cases have transferable jobs which means that there is a constant rotation in the personnel dealing with each case. This presents the need to have training with each rotation, which is a mammoth task.

⁹⁸ ‘4 Years Since POCSO: Unfolding of the POCSO Act in the State of Maharashtra’ (n 65).

⁹⁹ ‘240th Report on the Prohibition of Child Sexual Offences Act, 2012’ (n 47) Comment 10.2.

¹⁰⁰ ‘4 Years Since POCSO: Unfolding of the POCSO Act in the State of Maharashtra’ (n 65).

¹⁰¹ Delhi Commission for Protection of Child Rights, ‘Workshops & Training Sessions’ (Government of Delhi, 22 June 2021) <<https://dpcr.delhi.gov.in/workshops-training-sessions>> accessed 25 February 2022; Staff Reporter, ‘Training for Stakeholders in POCSO cases Stressed’ *The Hindu* (Thiruvananthapuram, 18 November 2020). <<https://www.thehindu.com/news/national/kerala/training-for-stakeholders-in-pocso-cases-stressed/article33120582.ece>> accessed 25 February 2022; Project Caca <<http://projectcaca.org/>> accessed 25 February 2022.

¹⁰² One of the authors of the paper provided legal representation to child sexual abuse victims in courts in Delhi from 2017-2019. During this period, she gave/attended multiple trainings on POCSO/mandatory reporting.

¹⁰³ ‘4 Years Since POCSO: Unfolding of the POCSO Act in the State of Maharashtra’ (n 65).

¹⁰⁴ *ibid.*, 251.

3. *Neglect of the Social and Cultural Complexities*

There are many nuances of child sexual abuse that the legislature has ignored while legislating on mandatory reporting. *One such nuance is the application of mandatory reporting in incest cases.* This becomes increasingly relevant since incest accounts for most instances of child sexual abuse. The National Crime Records Bureau Data from 2020 shows that in 96% cases relating to penetrative sexual assault and aggravated penetrative sexual assault, the offender was known to the victim.¹⁰⁵ As per a factsheet by HAQ Centre for Child Rights, based on the cases in which they have provided legal representation, about 87% accused are known to the child; 55% are neighbours; of close relatives - 77% are uncles/aunts (paternal or maternal), and 59% of cases report accused biological fathers (33% cases have stepfathers as accused).¹⁰⁶ Further, in most such cases, victims turn hostile and cases end in acquittal.¹⁰⁷

In many cases of incest, the other parent or a family member may know about the ongoing abuse or may suspect it. However, keeping in mind family dynamics and the safety of themselves and the child, they may be hesitant in reporting. The hesitance to report is also heightened due to the high sentences under the POCSO, extending to the death penalty (post the 2019 amendment) in cases of incestuous penetrative sexual assault.¹⁰⁸ In *Shreya's* case,¹⁰⁹ the child confided in her mother about the abuse, but they decided to not file a police complaint since the father was supporting the family and they loved him. However, Shreya informed her mother a few months later that her father had abused her again, and the mother filed a police complaint. In this instance, it was unclear whether the mother could be prosecuted for not reporting when the first instances of abuse occurred and reporting only when the last instance occurred. However, she was not 'charge-sheeted'. Whereas in *Naina's* case,¹¹⁰ in a similar circumstance, charges were framed under Section 21 against the mother initially. However, the child later changed her mind and did not want her mother prosecuted. The case is still ongoing so one does not know if the child will turn hostile to protect her mother or not. However, there is a likelihood that she might, as her mother is her only other caregiver. In such

¹⁰⁵ National Crime Records Bureau, Table 4A.10, Crime in India, 2020, available at: <<https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>> accessed 30 December 2022.

¹⁰⁶ HAQ Centre for Child Rights and InteGRAL Asia, 'Access to Justice and Restorative Care: Five Years of Our Work' (February-March 2022) table 2. available at <<https://www.haqrc.org/wp-content/uploads/2022/06/evaluation-report-access-to-justice-and-restorative-care.pdf>> accessed 30 December 2022.

¹⁰⁷ HAQ Centre for Child Rights & CivicDataLab, '*Data4Justice - Unpacking Judicial Data to Track Implementation of the POCSO Act in Assam, Delhi & Haryana (2012 to April 2020): A Summary Report*' available at <<https://www.haqrc.org/wp-content/uploads/2021/12/upacking-judicial-data-implementation-of-pocso-act-summary-report.pdf>>.

¹⁰⁸ The Protection of Children from Sexual Offences (Amendment) Act 2019.

¹⁰⁹ This is a case from one of the authors' legal practice. The name of the victim has been changed to ensure anonymity.

¹¹⁰ *ibid.*

instances, other family members are unwilling to take in the child, and children end up in a shelter home, which is not an ideal living space for a child, and this further leads to the child wanting to go “home.” The Parliamentary Committee had also cautioned the dependency of the victim on the perpetrator emotionally and economically as being a deterrent for mandatory reporting.¹¹¹ The legislature has made provisions for mandatory reporting but has failed to take into account its complicated practical application, especially in cases of incest.

Another complication is its application in consensual sexual relationships between adolescents. The intent of the POCSO was to create punitive measures for sexual abuse, but owing to the high age of consent, the act inadvertently leads to criminalisation of consensual sexual activity between adolescents as well. Studies have shown that a percentage of cases in POCSO courts are cases relating to consensual sexual activity. The percentage of such cases varies from 5 to 21% depending on the state¹¹² with there being a 93.8% acquittal rate.¹¹³ Mandatory reporting would also lead to an increase in such cases as it burdens all members of the public to report all cases, including those that are consensual and higher responsibility is placed on persons in contact with children on a day-to-day basis such as teachers and doctors (as explained above). The burden is especially higher for this category of professionals since doctors are forced to report cases wherein a pregnancy occurs in an underage child, and teachers/social workers and other persons remain in close contact with children and interact with them at a personal level. Cases involving consensual activity adversely affect both children involved. From experience, in most cases, the girl involved is institutionalised specially when the parents may not be supportive of the child, and the boy ends up in an observation home/adult prison depending on his age. No good comes out of such cases. The legislature must be urged to carve out an exception for consensual/non-exploitative sexual acts by adolescents. The same has also been pointed out by way of an obiter by the Supreme Court in the case of *Maruthupandi v. State*,¹¹⁴ wherein the bench stated that “We (Judges) have encountered these problems...There are serious difficulties because of the definition of “child” under the POCSO.” Further, the Chief Justice of India, Justice DY Chandrachud, has also commented that the

¹¹¹ ‘240th Report on The Prohibition of Child Sexual Offences Act 2012’, (n 47) Comment 10.2.

¹¹² Centre for Child and the Law, ‘Implementation of the POCSO Act 2012 by Special Courts: Challenges and Issues’ (National Law School of India University, February 2018) <<https://ccl.nls.ac.in/wp-content/uploads/2017/01/Implementation-of-the-POCSO-Act-2012-by-spical-courts-challenges-and-issues-1.pdf>> accessed 25 January 2022, 133.

¹¹³ Enfold, UNFPA, UNICEF. ‘Implication of the POCSO Act in India on Adolescent Sexuality: A Policy Brief’, 13. <<http://enfoldindia.org/wp-content/uploads/2022/12/POSCO-Act-Policy-Brief.pdf>> accessed 2 January 2023.

¹¹⁴ *Maruthupandi v State*, Supreme Court of India, SLP(CrI) 2782/2021.

age of consent under POCSO needs to be relooked at in light of the growing cases of consensual sexual activity by adolescents.¹¹⁵

In addition, mandatory reporting acts as a barrier to children's access to reproductive rights in three ways. Firstly, it inhibits children from accessing contraceptive information and contraceptives¹¹⁶ since even the apprehension of abuse is to be reported.¹¹⁷ Secondly, it inhibits a child's access to safe abortion as, in the circumstance of a child becoming pregnant as a result of consensual sexual activity, they would be reluctant to seek abortion from a certified medical professional, who would be mandated to report the child's pregnancy.¹¹⁸ This would lead to the child seeking a back-alley abortion/at home abortions,¹¹⁹ endangering the child's life. Thirdly, it inhibits the right of the child to access health services during pregnancy as well as pre and post-natal care. There have been many such cases reported, such as in the case of *Olius Mawiong v State of Meghalaya*,¹²⁰ wherein a girl aged 17 years and 7 months was impregnated by her husband. When she went to seek medical assistance with her pregnancy, her case was reported under the mandatory reporting provision by her attending doctor. In this case, the High Court decided to quash the FIR, but there are many children in similar situations wherein Courts are reluctant to quash such FIRs involving consensual sexual activity. These reasons are also supported by Aarambh's study, which states that one of the reasons for doctors not being in favour of mandatory reporting is the obstruction in access to reproductive rights of children.¹²¹ The Supreme Court in the recent case of *X v. The Principal Secretary Health* has stated that the doctor, on request of the minor and their guardian, need not disclose the identity and other personal details of the minor, since Section 5A of the Medical Termination of Pregnancy Act,

¹¹⁵ TNN, 'CJI DY Chandrachud Pitches for Relook at "Age of Consent" under POCSO Act' *The Times of India* (New Delhi, 12 December 2022) <<https://timesofindia.indiatimes.com/india/cji-dy-chandrachud-pitches-for-relook-at-age-of-consent-under-pocso-act/articleshow/96139041.cms>> accessed 2 January 2023.

¹¹⁶ Dipika Jain and Brian Tronic, 'Conflicting Abortion Laws in India: Unintended Barriers to Safe Abortion for Adolescent Girls' (2019) 4 *Bioethics & Law*, *Indian Journal of Medical Ethics* 310, 312.

¹¹⁷ For example, if a 17-year-old girl were to ask her gynaecologist for contraceptive information or if an underage child went to buy condoms or birth control pills at the chemist, the doctor and the chemist would both be duty bound to report this as there is an apprehension that the children may indulge in sexual activity.

¹¹⁸ Mrinal Satish, Dr Aparna Chandra and Shreya Shree, 'Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study' (Centre for Reproductive Rights, New York, National Law School of India University, Bengaluru and Centre for Constitutional Law, Policy, and Governance, NLU Delhi) <<https://www.nls.ac.in/publications/legal-barriers-to-accessing-safe-abortion-services-in-india-a-fact-finding-study/>> accessed 20 February 2022, 148.

¹¹⁹ *ibid.*

¹²⁰ *Olius Mawiong v State of Meghalaya*, High Court of Meghalaya at Shillong, 2022 SCC OnLine Megh 332.

¹²¹ Patkar and Kandula (n 65) 227.

1971 (“MTP Act”) mandates confidentiality of persons seeking abortions.¹²² However, the judgement is not clear on how this would be applied in practice as, while this would ensure confidentiality, not disclosing the child’s name would defeat the very purpose of mandatory reporting.

Mandatory reporting in India has many ways to go. The legislature, civil society and central/state child rights bodies need to work together to resolve these issues and make mandatory reporting a provision that helps children and does not vitiate their other rights.

IV. COMPARATIVE ANALYSIS OF LEGISLATION AND LEGISLATIVE STRATEGY IN INDIA AND CHINA

The comparative analysis of the legislations in the two states is done on the basis of (A) divergence of their legislative models, and (B) explanations of the divergence in their legislative strategies from the lens of rule change versus cultural change.

A. The Divergence of Legislative Models

After analysing the law in the two countries, we believe that the essence of the law in both states is based on: 1) who is responsible for reporting, 2) whether a lapse in mandatory reporting is punishable, 3) what instances are to be reported and 4) the age of consent under law. The table below lays down these factors so we may further analyse the implementation of the law and the challenges faced by both countries in legislating mandatory reporting.

	Who is responsible for mandatory reporting?	Is Mandatory reporting punishable?	What instances are to be reported?	Age of consent under law
India	Everyone	Yes, for adults with imprisonment and/ or fine	Apprehension of an offence under POCSO being committed or having knowledge of an offence being committed.	18

¹²² *X v Principal Secretary Health and Family Welfare Deptt.*, 2022 SCC OnLine SC 1321, Supreme Court of India [81].

China	Differentiating Actors with duties to children (“ADC”) (mandated) and Ordinary actors (“OA”) (suggested).	OAs are not punishable for non-reporting. However, ADCs are punishable but mainly through disciplinary action and, rarely, penal action against them.	Differentiating reporting conditions between ADC and OA, for details by reference to Article 11 of LPM (2020 Revision)	14 ¹²³
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In China, the legislative model is geared towards selected actors rather than being universal in nature. In terms of law enforcement strategy, it focuses more on the public awareness of the law and the possible challenges for the implementation capacity. Enforcement measures lean towards influencing or attracting compliance rather than forcing compliance.

China began its foray in mandatory reporting by giving the right to the public to stop/report child rights violations in the 1990s. From the 2010s onwards, influenced by the child rights movement, civil society-based lawyers and front-line juvenile tribunal judges nudged mandatory reporting a step further by differentiating ADC and OA through abstract judicial interpretations. These steps, however, were focused more on promoting awareness among reporting entities and individuals rather than on enforcement, with no punishment for non-reporting. From 2015 onwards, the legislature took a few steps further by incorporating mandatory reporting into ADV Law and LPM (2020 Revision). But the law continues to be very modest with regards to the legal consequences for non-reporting, which are mainly in the form of disciplinary sanctions.

In terms of implementation, China faces challenges similar to India, such as low awareness and low willingness to report. But China has made conscious efforts to incentivise reporting through diversified policy experiments for enhancing reporting awareness and reporting willingness after 2018. However, this approach of policy experimentalism has also caused fragmentation of the reporting system. Another challenge of policy experimentalism is that it heavily relies on institutional incentives and leadership attention. For example, the current commitment of law enforcement on mandatory reporting by the SPP has been prioritized under the leadership of Dr. Zhang Jun, Chief of SPP.¹²⁴ We are not very sure if these efforts would sustain if the SPP shifts its priority to other areas under a new leadership.

¹²³ Criminal Law of the People’s Republic of China, art 236 s 2.

¹²⁴ Zhang Jun has delivered several speeches on promoting the mandatory reporting system which no previous leaders of SPP have commented on. For example, he clearly mentioned that institutional building of two systems: database of sexual offenders for background screening of candidates seeking jobs closely working with children and mandatory reporting cannot wait. Wang Jun, ‘SPP Emphasized that the Institutional Building of the Two Systems Cannot Wait’, *The Beijing News* (19 January 2022) <https://www.sohu.com/a/367867667_114988> accessed 28 April 2022.

In India, universal mandatory reporting was centrally introduced via the POCSO in 2012, thereby extending the obligation for mandatory reporting of child sexual abuse to the public at large and making non-reporting a punishable offence for adults. Unlike China, India did not introduce mandatory reporting in a phased manner. The legislature directly introduced universal mandatory reporting even though the parliamentary committee suggested a milder approach. This has been shown to be detrimental in many aspects. The first has been the lack of use of the provision as is visible from the CCL-NLSIU study, with a very meagre number of cases being reported by persons other than the victim/their family. Secondly, there has also been a lack of implementation of the provision with regard to other stakeholders, the police as well as the judiciary, as seen through the Aarambh study and case law. One can conclude that this has been due to the controversial nature of the provision itself, and the issues it presents in terms of both implementation and implication: 1) lack of guidelines on the application of the provision; 2) lack of capacity building for key stakeholders; and 3) the neglect of social and cultural complexities.

B. Explanations for the Divergence in Legislative Strategy

Mandatory reporting is deeply rooted in the willingness of society to report, as without the same, implementation is impossible. It connects public awareness with law enforcement. This brings cultural change to the forefront as an enabling mechanism for reporting, as well as an influence on the legislative approach that is taken by the State. After delving into both systems of mandatory reporting, we can conclude that India and China have adopted very different strategies in legislating mandatory reporting. China has focused more on cultural change, using law as an instrument for persuading societal change, which is manifested in both the rule-making tools and the use of coercive power in implementation. India on the other hand, has relied on legislative change to influence societal change, using the law as a vehicle by introducing punitive measures for non-reporting. The sharp difference is even reflected in the focus of implementation. In China, the focus is on who should lead the implementation, how to improve the effectiveness of the implementation and how to mobilize the attention of the public and law enforcement agencies due to the ambiguousness of the framing of the legal content. However, in India, the focus has been on comprehending the implementation of the law due to a lack of guidelines, especially how the provision interacts 1) with the nuances of child sexual abuse such as incest and 2) with existing laws such as the age of consent under POCSO and the MTP Act. Steps in this direction have only been made by civil society and the judiciary, with no input from the legislature at the state or central level.

Based on the existing literature for rule change versus culture change,¹²⁵ or the study of legislative efficiency by differentiating legal strategy results (the change for the law itself) from legal policy outcomes (the implementation),¹²⁶ or legal formalism v. policy experimentation¹²⁷ we develop our prognosis on the difference in the legislative strategy regarding mandatory reporting taken by China and India respectively.

In China, legislators and policy makers are very sensitive to implementation. One of the key reasons stems from the special demand for political legitimacy created by the horizontal and vertical centralisation of Chinese constitutional governance, and the lack of an electoral democracy. That means law-making is centralised and law implementation is linked to outcome based political legitimacy.

When the legislative power is centralised, it means that the policymakers' concern would be taken as priority. One of the authors has participated in more than ten legislative and policy-making processes in China including the LPM 2004 Revision. Through participatory observations, the author found that in the legislative process, policymakers have disproportional say. When legislators or policymakers have no confidence in the implementation, they would push for the law to be more general, or more ambiguous in terms of punishment, or even without specific punishment. This pattern is not just limited to children's rights but spills across policy domains.¹²⁸ This resulted in Chinese legislation being principle-based and hence criticised as being a 'toothless tiger'.¹²⁹ This gives a lot of leeway to implementation agencies. On the flip side, it is also helpful in dealing with social issues in need of substantial cultural changes such as the public perception of their role in intervening in child abuse. This is evidenced by the legislative model of mandatory reporting. Even today, the punishment for non-reporting is minimal.

From the other side, when the legislative power is centralized the use of the power needs to be very prudent to prevent devastating consequences. Since the Cultural Revolution, the Communist Party of China ('CPC') has shifted more to a model of policy experimentalism known as "Across the River by Feeling

¹²⁵ Thomas B Stoddard 'Bleeding Heart: Reflections on Using the Law to Make Social Change' (1997) 72 *New York University Law Review* 967.

¹²⁶ David Ike, 'Theory of Efficiency in Legislative Strategy: Brief Legal Rational Analysis' (2021) 2 *Law and Social Justice Review* 2.1 184, 187-189.

¹²⁷ Victoria Nourse and Gregory Shaffer, 'Empiricism, Experimentalism, and Conditional Theory' (2014) 67 *SMU Law Review* 141; Jennifer Wallner, 'Legitimacy and Public Policy: Seeing Beyond Effectiveness, Efficiency, and Performance' (2008) 36 *Policy Studies Journal* 421.

¹²⁸ David L Weller 'The Bureaucratic Heavy Hand in China: Legal Means for Foreign Investors to Challenge Agency Action' (1998) 98 *Colum L Rev* 1238.

¹²⁹ Gongyi Wang, 'Revising the Law to Protect Children' (2020) 33 *Journal of Beijing University of Aeronautics and Astronautics (Social Sciences Edition)* 1, 2.

the Stones¹³⁰. Scholars generally agree that policy experimentation after the reform era enabled China's fast economic development and enhanced its political resilience through increasing the capacity of the CPC to adapt institutions and policies for economic and social transformation.¹³¹ The policy experimentalism provides the political background to understand the legislative strategy of mandatory reporting in China. Firstly, the agenda setting of mandatory reporting is through an ever-evolving experimental procedure, from announcing it as a right, to announcing it as a duty without punishment, to announcing it as a duty for certain stakeholders with mild punishment. Secondly, the implementation of the law is also through pilots from a local level to a national level, led by SPP.

Furthermore, unlike a liberal democracy, which focuses on procedural legitimacy through elections and judicial review, Chinese political legitimacy is much more outcome based.¹³² That means that the law enforcement effect has a direct link to political legitimacy, which creates more concerns toward law implementation. When the legislative issue is closely linked to changing awareness, legislators would be more careful. During the legislation and policymaking of mandatory reporting, the key issue discussed was changing people's awareness and attitude towards child sexual abuse and other abuse by parents. Civil society usually pushes for clearer sanctions while policymakers insist on soft rules and cultural awareness programs. Sometimes, certain tragic incidents add to the bargaining power of civil society for more specific enforcement provisions, but most of the time policy-makers' concerns dominate. Legislators have figured out the close link between public awareness and law enforcement for mandatory reporting, which makes them more conscious of the implementation challenges. Hence mandatory reporting has been understood as a cultural issue and has been responded to in an evolving process. Firstly, China has never been bold enough to place the burden of punishable reporting on all adult citizens. Secondly, it hesitates to use coercive power for enforcement and has mainly focused on raising awareness among the public from 1990 to 2015. Thirdly, even if legislation provides for punishment, it is very modest and abstract, and the main reliance of law enforcement continues to be on public awareness campaigns.

¹³⁰ It means that the reform in China is through policy experimentalism. More discussions can be accessed in Sebastian Heilmann, 'Policy Experimentation in China's Economic Rise' (2008) *Studies in Comparative International Development* 1; Jessica C Teets and Reza Hasmath, 'The Evolution of Policy Experimentation in China' (2020) 13 *Journal of Asian Public Policy* 49; Shaoda Wang and David Y Yang, 'Policy Experimentation in China: The Political Economy of Policy Learning' (2021) National Bureau of Economic Research Working Paper 29402 <<https://www.nber.org/papers/w29402>> accessed 26 January 2022. See also Wenjuan Zhang, 'Another Perspective to Read the Picture of Lawyering for Change in China' in John Mathew, Vishwas H Devaiah, Pritam Baruah, Moiz Tundawala and Niraj Kumar (eds) *The Indian Yearbook of Comparative Law 2019* (Springer Singapore 2021), 330.

¹³¹ Heilmann, *ibid*; Teets, *ibid*; Wang, *ibid*.

¹³² Yun-han Chu, 'Sources of regime legitimacy and the debate over the Chinese Model' [2013] *China Review* 1.

Unlike China, Indian political legitimacy is based on universal suffrage and judicial review.¹³³ The State comparatively faces lesser pressure of outcome-based legitimacy. If the legislative procedure is legitimate, the legislature isn't held accountable for implementation failure. In India, the POCSO was enacted as an aftermath of a study conducted by the Ministry of Women and Child Development on 'Child Abuse' in 2007.¹³⁴ The study found that 53.22% of children had faced one or more forms of sexual abuse.¹³⁵ A need was felt by both civil society¹³⁶ and the legislature to enact separate legislation to deal with child sexual abuse, as: 1) the IPC did not deal specifically with sexual abuse against children; 2) the IPC was not gender-neutral in its detailing of sexual offences which meant that sexual abuse against male children was not detailed, the only provision available was Section 377, which dealt with peno-anal penetration and; 3) at the time, the IPC also did not detail all sexual offences which are covered under the ambit of POCSO.¹³⁷ The drafting of the bill began in 2007 and after five years of consultations, the bill came to fruition in 2012.¹³⁸

The POCSO bill was subject to review by a parliamentary standing committee which had extensive consultations with ministries, State Governments, civil society, and experts.¹³⁹ The Committee additionally also issued a press release to get views from the public and civil society on the proposed legislation.¹⁴⁰ The Committee concluded that "... given the situation prevailing at ground level, such universal mandatory reporting cannot be considered practical. It might act as counter-productive for the child victims themselves".¹⁴¹ They further concluded that Section 21 should be amended to have stakeholder-specific mandatory reporting.¹⁴² The Committee predicted in their report the implementation challenges that may arise. However, their comments were not considered, and Section 21 was retained as is.

¹³³ Buultjens, Ralph. "India: religion, political legitimacy, and the secular state." *The ANNALS of the American Academy of Political and Social Science* 483.1 (1986): 93-109. Also see Upendra Baxi, 'Law, Politics, and Constitutional Hegemony: the Supreme Court, Jurisprudence and Demoprudence,' in Sujit Choudhry and et al (ed.) *The Oxford Handbook of the Indian Constitution*, (OUP 2016) 94.

¹³⁴ Child Rights and You, 'All You Need to Know About Protection of Children From Sexual Offences (POCSO) Act' <<https://www.cry.org/downloads/safety-and-protection/Protection-of-Children-from-Sexual-Offences-2013.pdf>> accessed 25 February 2022.

¹³⁵ *ibid.*

¹³⁶ Centre for Child and the Law, 'Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues' (National Law School of India University, February 2018) <<https://ccl.nls.ac.in/wp-content/uploads/2017/01/Implementation-of-the-POCSO-Act-2012-by-speical-courts-challenges-and-issues-1.pdf>> accessed 25 January 2022.

¹³⁷ *ibid.*

¹³⁸ '240th Report on The Prohibition of Child Sexual Offences Act, 2012' (n 47).

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*, Recommendation 10.3.

¹⁴² *ibid.*, Recommendation 10.4.

The active participation of civil society has enabled an ambitious and comprehensive legislation, unlike China which is very conservative and modest due to the concerns of the implementation challenges. Due to the above, the mandatory reporting law is much more aggressive in terms of legislative change. The text of the law itself is well-rounded, and the UMR provision imposes penal sanctions for non-reporting (albeit with a few exceptions). The law is used as a coercive instrument to change the cultural attitude. Initiatives are being taken up by civil society to bring about cultural change, but actions from the government and legislature itself are scant.

However, the enforcement of the provision itself has many obstacles and the use of the provision is infrequent. In practice, despite the law providing for UMR, the implementation is seen to be more stakeholder-specific when it comes to punishment for non-reporting with a focus on stakeholders such as doctors and police officers. It is surprising to see that there have been no revisions or detailed rules for implementation of mandatory reporting to address these challenges, even after a decade of the enactment of POCSO, despite objections having been raised to the provision during the drafting of the Act, and the implementation barriers being brought up before the judiciary time and again. The activist judiciary does attempt to bridge the implementation gap, even though their legal interpretations are not always coherent. There is an urgent need for comprehensive guidelines on mandatory reporting in India to circumvent the negative implications of mandatory reporting, to better manage the implementation challenges and for the legislature to pay heed to the recommendations to limit mandatory reporting to specific stakeholders, at least in terms of criminal sanctions.

V. CONCLUSION

Mandatory reporting legislation imposes an obligation on select professionals, or the general public, to report child abuse cases for early identification of abuse and protection of children. It was enacted first in the United States of America and has now proliferated to other jurisdictions. India and China have both enacted mandatory reporting legislations in the last decade. Despite some similar challenges in law enforcement, both countries have taken a distinctive approach with their respective legislations. Their legislative content varies in terms of who should report, under what circumstances, report to whom, and the punishment for non-reporting.

Their divergence in legislative strategy is even sharper. China treats public awareness as the inhibitor for the legislative content and adopts an incremental and experimental legislative approach, shifting gradually first from resetting the public's role in family protection, to setting reporting duties for selected actors through abstract judicial interpretations (but without clear sanctions),

and then to legislating punishable mandatory reporting for selected actors. The challenge faced in the Chinese context is that the soft law gives law enforcement agencies discretionary power with regard to enforcement.

India, on the other hand, has focused on instituting a well-rounded Universal Mandatory Reporting provision and legislating a framework to pave the way for cultural change. It also presents implementation challenges such as application cases of incest and consensual sexual activity between adolescents, and the obstruction of the child's access to reproductive health and cultural barriers. India's UMR is fraught with implementation barriers and there is a need for the legislature, judiciary and civil society to work together to enhance the existing framework and make it more geared towards implementation.

The sharp divergence in dealing with the relationship between law and society in both countries is fascinating. We find that the concern of political legitimacy and the dominance of civil society or law enforcement agencies in the legislative process influences the legislative strategy. In China, outcome-based political legitimacy and the dominance of law enforcement agency representatives over the weaker civil society in the legislation process pulls the legislative process more toward implementation capacity, while in India the powerful influence of society leads to the focus being more on the legislation itself, while neglecting the social and cultural complexities. India and China both face enforcement challenges, albeit for different reasons. In practice, there is an urgent need for active participation by all stakeholders, to bridge the gap between culture and the law for better enforcement of mandatory reporting for child abuse. In terms of scholarship, we need more nuanced and empirical comparative studies to understand the impact of legislative divergence on the effects of law enforcement in both contexts.